UNITED STATES SENATE
REPUBLICAN
POLICY COMMITTEE

Larry E. Craig, Chairman
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July 11, 2002

The Ninth Circuit – Fix It!

Ninth Circuit's "Pledge" Ruling Underscores That Court's Desperate Need for Balance

THEN:

> *This Senate has no right to . . . try to influence the independence of the [Ninth Circuit] in this way. That is unconstitutional. Our responsibility under the Constitution is to vote on whether to confirm judges. It is not our responsibility, and it is not our right, to try to influence or intimidate judges after they are confirmed.*
>
> – Senator Daschle, *Congressional Record*, S1255, March 8, 2000, during debate on the Berzon and Paez nominations

NOW:

> *This [Ninth Circuit's Pledge of Allegiance] decision is nuts. It is just nuts. A higher court should overturn this, or we will do it.*
>
> – Senator Daschle, June 26, 2002

For years Republican Senators have observed that the Ninth Circuit Court of Appeals is far too left-leaning and inclined to judicial activism. Several Republicans have offered solutions for this problem, ranging from restructuring the circuit to opposing activist, liberal nominees while urging the confirmation of non-activist nominees in order to better balance the court.

In response to those solutions, Democrats have argued that the Ninth Circuit is not a "rogue" court, but is one that well serves the people living in the circuit (Washington, Idaho, Oregon, California, Alaska, Hawaii, Montana, Arizona, Nevada, Guam, and the Commonwealth of the Northern Mariana Islands). They have balked at the notion that the Ninth Circuit is imbalanced and have rejected efforts to add more centrist and conservative judges to its bench.

Democrats Don't Want to Touch the Ninth Circuit

During debate on President Clinton's controversial nominees to the Ninth Circuit – Marsha Berzon and Richard Paez – in March of 2000, Democrats were critical of Republican assertions that the

Ninth Circuit is "out-of-whack" and a "rogue" court. They vehemently opposed any suggestions that the Senate ought to help balance that court by opposing the Berzon and Paez nominations.

- "Opponents cite concerns about the allegedly out-of-whack Ninth Circuit, which detractors like to call a 'rogue' court. . . . Why should we punish the millions of people who live in the Ninth Circuit by depriving them of the judges they need to mete out timely and fair justice?"

  – Senator Biden, *Congressional Record*, S1356, March 9, 2000

- "But more fundamentally, it is simply not factually correct that the Ninth Circuit is out of step with the Supreme Court and other circuit courts. . . . In more recent years, the statistics show even more clearly that the Ninth Circuit is not a runaway train that somehow needs to be slowed down, but many in the Senate would like it to become a more conservative circuit, perhaps to be broken into two conservative circuits."

  – Senator Feingold, *Congressional Record*, S1299, March 8, 2000

- "I think the most disconcerting aspect of this debate, for those who may be watching, is the concern that I would have, having heard many of our colleagues express their virtual desire to influence the Ninth Circuit and the decisions made there. . . . If we are saying we ought to vote against someone, or for someone, because we want to influence the direction of a certain circuit, I think we get precariously close to creating the kind of politicization of the judiciary that, to me, is frightening. . . . Let us not say this ought to be some judgment on the Ninth Circuit. Let us not say that somehow we want to send a message to the Ninth Circuit or any circuit, for that matter. That is not our role. That is not our responsibility."

  – Senator Daschle, *Congressional Record*, S1365-1366, March 9, 2000

Where the Ninth Circuit Has Taken the Nation

The Ninth Circuit has become well-known for a multitude of reversals from the Supreme Court and especially for a number of controversial decisions that reflect an activist court.

- The Justice Department's Office of Legal Policy has kept statistics on the Nation's Circuit Courts. Those statistics reveal that the Ninth Circuit is reversed by the Supreme Court more frequently, and by a larger margin, than any other court of appeals in the country.

  ✓ Ninth Circuit decisions reviewed by the Supreme Court have been reversed 80 to 90 percent of the time over the past six terms; during the same period, its rulings have received an average of between 1.5 and 2.5 votes from Supreme Court Justices.

  ✓ In 1996-97, the Ninth Circuit was reversed in 27 of 28 cases, 16 of which were unanimous. In 1999-2000, the Ninth Circuit was reversed in 9 of 10 cases. In the most recent term, the Supreme Court reversed the Ninth Circuit in 14 of 18 cases, 7 of which were unanimous.

- ✓ Between 1985 and 1997, the Ninth Circuit was reversed in a total of 157 cases while the other 11 regional courts of appeals were reversed an average of 46 times each.

- ✓ Between 1985 and 1997, the Ninth Circuit was reversed unanimously (in non-summary dispositions) a total of 38 times while the other 11 regional appellate courts averaged fewer than 10 unanimous reversals each.

Cases such as the following are the types for which the Ninth Circuit has become infamous:

- ***Finley v. National Endowment of the Arts***: On November 5, 1996, the Ninth Circuit declared unconstitutional a statute requiring the National Endowment for the Arts (NEA) to "take into consideration general standards of decency and respect for the diverse beliefs and values of the American public" (20 U.S.C. 954 (d)(1)) when doling out taxpayer-funded grants. On June 25, 1998, the Supreme Court, with an 8-1 majority, reversed the Ninth Circuit's decision and upheld the decency requirements for NEA grants.

- ***Compassion in Dying v. Washington***: In November of 1991, the citizens of Washington State rejected Initiative 119, which would have allowed physicians to assist terminally ill patients in committing suicide, overturning the state's long-standing law against assisted suicide. On March 16, 1996, the Ninth Circuit *en banc* declared that Washington's ban on assisted suicide was unconstitutional. On June 26, 1997, the Supreme Court unanimously reversed the Ninth Circuit's ruling and upheld the will of the people of Washington State.

- ***United States v. Oakland Cannabis Buyers' Cooperative***: On September 13, 1999, the Ninth Circuit issued an opinion effectively reversing a district court's injunction against cannabis clubs by ordering the lower court to consider modifying its order based on the notion that "medical necessity" is a legal defense. Also, on May 10, 2000, the Ninth Circuit ruled to allow the defense that smoking "medical marijuana" is a fundamental right, overturning the district court's ruling that such a defense was inadmissable. On May 14, 2001, the Supreme Court unanimously reversed the Ninth Circuit by ruling that the Federal statute prohibiting marijuana use does not include an exception for ill patients.

Even after multiple out-of-the-mainstream decisions and frequent reversals imposed by the Supreme Court, Democrats refused to address the problems with the court's activism and out-of-the-mainstream views. This all changed Thursday, June 27, when the American people woke up to the following headlines in their morning papers:

"God-Awful: Holy War as Court Outlaws Pledge"

"A Left Coast federal-court decision shooting down the Pledge of Allegiance was slammed yesterday as 'junk justice' by lawmakers and leaders from New York and around the country.

In a first-of-its-kind ruling, the 9th U.S. Circuit Court of Appeals in San Francisco took exception to the words 'under God' – added to the Pledge by Congress in 1954 – saying the phrase violated the separation of church and state."

– *New York Post*, June 27, 2002

"Court Ruling on the Pledge Ignites Furor"

– *USA Today*, June 27, 2002

"U.S. Court Votes to Bar Pledge of Allegiance"

"The Pledge of Allegiance, recited by millions of American children at the start of each school day, is unconstitutional because it describes the United States as 'one Nation, under God,' a federal appeals court ruled yesterday."

– *The Washington Post*, June 27, 2002

"Judges Ban Pledge of Allegiance From Schools, Citing 'Under God'"

– *The New York Times*, June 27, 2002

"Pledge of Allegiance Ruled Unconstitutional; Democrats and Republicans Denounce Appeals Panel Decision"

– *The Washington Times*, June 27, 2002

"Pledge of Allegiance Ruled Unconstitutional; Many Say Ruling by S.F. Court Hasn't a Prayer After Appeals"

"The Pledge of Allegiance, a patriotic ritual of America's classrooms, is unconstitutional because the phrase 'under God' is a government endorsement of religion, a federal appeals court ruled Wednesday."

– *San Francisco Chronicle*, June 27, 2002

Time to Rein It In

Senator Daschle and his colleagues have finally recognized what most Americans have known all along – the Ninth Circuit is out of touch. Where before they were in denial, they now have joined Republicans in denouncing the court's decision. Let's hope that the Democrats will react with more concrete action than just voting for a Sense of the Senate resolution and a bill, S. 2690, to reaffirm the Pledge. What they need to do is confirm President Bush's judicial nominations, especially the three Ninth Circuit Court nominees pending before ~~the Senate (Richard R. Clifton, Carolyn B. Kuhl, and Jay~~ S. Bybee).

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